

1 BILL LOCKYER
Attorney General of the State of California

2 RICHARD FRANK
Chief Deputy Attorney General

3 THOMAS GREENE
Chief Assistant Attorney General

4 THEODORA BERGER
Senior Assistant Attorney General

5 SANDRA GOLDBERG
Deputy Attorney General

6 State Bar No. 138632

LAURA ZUCKERMAN

7 Deputy Attorney General
State Bar No. 161896

8 1515 Clay Street, 20th Floor
Oakland, CA 94612

9 Telephone: (510) 622-2145

Fax: (510) 622-2270

10 sandra.goldberg@doj.ca.gov

Attorneys for People of the State of California *ex rel.*

11 Bill Lockyer, Attorney General of the State of
California

E-filing

ORIGINAL
FILED

APR 19 2006

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

13 IN THE UNITED STATES DISTRICT COURT
14 FOR THE NORTHERN DISTRICT OF CALIFORNIA
15 OAKLAND DIVISION

ADR

16 **PEOPLE OF THE STATE OF CALIFORNIA**
17 *ex rel.* **BILL LOCKYER, ATTORNEY**
18 **GENERAL OF THE STATE OF**
CALIFORNIA,

19 Plaintiff,

20 v.

21 **OFFICE OF MANAGEMENT AND BUDGET,**

22 Defendant.

Case No.:

C06-02654

SC

**COMPLAINT FOR INJUNCTIVE
RELIEF UNDER THE FREEDOM
OF INFORMATION ACT**

23
24 The People of the State of California, by and through Plaintiff Bill Lockyer, Attorney
25 General of the State of California, bring suit under the Freedom of Information Act, 5 U.S.C.
26 §552, *as amended* ("FOIA"), seeking injunctive relief to require the Office of Management and
27 Budget to provide records in response to Plaintiff's requests and to refrain from improperly
28 withholding records. The People allege as follows:

COMPLAINT FOR INJUNCTIVE RELIEF UNDER THE FREEDOM OF INFORMATION ACT

JURISDICTION

1
2 1. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5
3 U.S.C. §552(a)(4)(B).

4 2. Venue in the Northern District of California is proper under 5 U.S.C.
5 §552(a)(4)(B).

PARTIES

6
7 3. Plaintiff Bill Lockyer is the Attorney General of the State of California. Acting in
8 his official capacity as chief law enforcement officer of the State of California, he has requested
9 and been denied access to the records at issue here.

10 4. Defendant Office of Management and Budget ("OMB"), an office within the
11 Executive Office of the President, is an agency within the meaning of 5 U.S.C. §552(f), is subject
12 to the requirements of FOIA, and has improperly withheld the records at issue here.

FACTUAL ALLEGATIONS

13
14 5. On August 30, 2005, the National Highway and Traffic Safety Administration
15 ("NHTSA") published Proposed Rules regarding Average Fuel Economy Standards for Light
16 Trucks; Model Years 2008-2011 (70 Fed. Reg. 51414 - 51466). These rules will modify the
17 corporate average fuel economy ("CAFE") program for light trucks.

18 6. In a letter dated October 5, 2006, attached as Exhibit A ("the FOIA Request"),
19 Plaintiff requested from several federal agencies, including OMB, NHTSA and the Secretary of
20 the Office of Transportation ("DOT"), the disclosure of "[a]ll records ... related to the discussion
21 regarding state regulation of motor vehicle carbon dioxide emissions found under the heading
22 'Executive Order 13132 Federalism' published in the Federal Register, volume 70, at page
23 51457." The referenced discussion includes statements by NHTSA that a state law or regulation
24 seeking to reduce motor vehicle carbon dioxide emissions would be preempted by federal law,
25 and that such state law would interfere with NHTSA's implementation of the CAFE statute.

26 ///

27 ///

28 ///

1 7. OMB responded to Plaintiff's request in a letter dated November 15, 2005,
2 attached as Exhibit B. The letter stated that, due to unusual circumstances, and under the
3 authority of 5 U.S.C. §552(a)(6)(B), an extension of up to ten (10) working days would be
4 necessary to process the request.

5 8. OMB did not respond further to the FOIA Request until sending a letter dated
6 December 14, 2005, attached as Exhibit C, which Plaintiff did not receive until January 4, 2006.
7 This letter was accompanied by nine pages of heavily-redacted documents. The letter stated that
8 OMB had located 52 responsive documents; of these 52 documents, it was withholding 47 in
9 their entirety, and portions of five others, based on 5 U.S.C. section §552(b)(5), which exempts
10 from public disclosure "inter-agency or intra-agency memorandums or letters which would not be
11 available by law to a party other than an agency in litigation with the agency. . . ." OMB's letter
12 also stated that it had redacted information in the five documents it produced in part that it
13 determined was non-responsive and outside the scope of Plaintiff's request.

14 9. Plaintiff sent OMB a letter dated January 18, 2006, attached as Exhibit D,
15 requesting that, for each of the 47 documents withheld, OMB identify the (1) author; (2)
16 recipient(s); (3) date; and (4) subject, so that Plaintiff could determine whether to appeal their
17 withholding. OMB did not respond to this request in a timely manner, and indeed never did
18 provide this information.

19 10. By letter dated February 1, 2006, attached as Exhibit E, Plaintiff submitted an
20 appeal of OMB's December 14, 2005 response to the FOIA Request, both as to the 47 withheld
21 documents and the redacted portions of the documents that were produced in part. Plaintiff's
22 appeal was timely pursuant to OMB regulations at 5 C.F.R. § 1303.10(e) (2005).

23 11. By letter dated March 10, 2006, attached as Exhibit F, OMB made a final denial
24 of the FOIA Request by stating that it was continuing to withhold 34 of the 52 responsive
25 documents in their entirety; it had determined two of the 52 documents were not responsive to
26 the FOIA Request; the redacted information in the five documents previously produced would
27 not be disclosed; and portions of the additional responsive documents that OMB was now
28 providing were being withheld based on the exemption in 5 U.S.C. §552(b)(5). This letter was

1 accompanied by 12 pages of heavily-redacted documents. Although this letter purported to
2 respond both to the appeal and to Plaintiff's January 18, 2006 request, OMB did not provide a
3 response to the request in the January 18 letter.

4 **CAUSE OF ACTION FOR INJUNCTIVE RELIEF**
5 **ALLEGED AGAINST DEFENDANT OMB**

6 12. Plaintiff incorporates by reference Paragraphs 1 through 11 inclusive, as if fully
7 set forth herein.

8 13. Plaintiff sent the FOIA Request attached as Exhibit A to Defendant OMB on
9 October 5, 2005.

10 14. Plaintiff is informed and believes that the information sought by the FOIA
11 Request is contained in agency records within Defendant OMB's possession and control.

12 15. By letter dated December 14, 2005, Defendant OMB denied Plaintiff's request in
13 its entirety as to 47 out of 52 responsive documents identified, alleging that they were exempt
14 from disclosure under 5 U.S.C. §552(b)(5), and denied it in part as to five additional documents,
15 portions of which it redacted as non-responsive and portions of which it withheld based on the
16 exemption in 5 U.S.C. §552(b)(5).

17 16. Plaintiff filed an administrative appeal of this decision pursuant to 5 U.S.C.
18 §552(a)(6)(A) on February 1, 2006. Plaintiff's appeal was timely pursuant to OMB regulations
19 at 5 C.F.R. § 1303.10(e) (2005).

20 17. By letter dated March 10, 2006, Defendant OMB made a final denial of Plaintiff's
21 request as to (1) 34 responsive documents, which documents it withheld in their entirety, again
22 alleging that they were exempt from disclosure under 5 U.S.C. §552(b)(5), and (2) the redacted
23 portions of the 16 documents Defendant OMB produced in part, some portions of which were
24 redacted as non-responsive and some portions of which were withheld based on the exemption in
25 5 U.S.C. §552(b)(5).

26 18. The 34 agency records withheld in their entirety, and the redacted portions of the
27 16 records that were produced in part, have been improperly withheld. Pursuant to 5 U.S.C.
28 §552(a)(3), Plaintiff has a right of access to these records and portions of records, and FOIA

1 requires their disclosure. As they do not fall within any of the FOIA's exemptions from required
2 disclosure, Defendant OMB has no legal basis for withholding them.

3 19. Alternatively, even if the records sought were otherwise exempt from required
4 disclosure pursuant to 5 U.S.C. §552(b), there is a strong public interest in their disclosure to the
5 Attorney General for law enforcement purposes, including the prosecution and defense of
6 lawsuits related to the laws and regulations that California has adopted to protect the public from
7 adverse impacts of carbon dioxide emissions.

8 20. Plaintiff has exhausted his administrative remedies.

9 PRAYER FOR RELIEF

10 WHEREFORE, Plaintiff requests that this Court:

11 1. Take jurisdiction of this cause;

12 2. Order Defendant OMB to prepare and file an itemized index, for all withheld
13 documents and portions of documents, containing all information needed to evaluate each
14 claimed exemption, including but not limited to, identification of the segregable portions of the
15 documents withheld, the nature of the information contained in each portion, and the specific
16 justification for withholding of each such portion;

17 3. Enjoin Defendant OMB from withholding all records or portions of records
18 improperly withheld, and order their immediate disclosure to Plaintiff;

19 4. Grant Plaintiff his costs and attorneys' fees in this action, pursuant to 5 U.S.C.
20 §552(a)(4)(E); and

21 5. Grant such other and further relief as the Court shall deem just and proper.

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 Dated: April 19, 2006

2 Respectfully submitted,

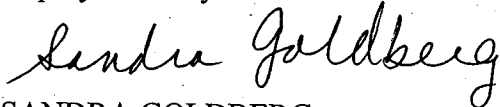
3 BILL LOCKYER
4 Attorney General of the State of California

5 RICHARD FRANK
6 Chief Deputy Attorney General

7 THOMAS GREENE
8 Chief Assistant Attorney General

9 THEODORA BERGER
10 Senior Assistant Attorney General

11 LAURA ZUCKERMAN
12 Deputy Attorney General

13 

14 SANDRA GOLDBERG
15 Deputy Attorney General

16 Attorneys for People of the State of California
17 *ex rel.* Bill Lockyer, Attorney General of the
18 State of California

EXHIBIT A

BILL LOCKYER
Attorney General

State of California
DEPARTMENT OF JUSTICE



1515 CLAY STREET, 20TH FLOOR
P.O. BOX 70550
OAKLAND, CA 94612-0550

Public: 510-622-2100
Telephone: 510 622-2133
Facsimile: 510 622-2270
E-Mail: marc.melnick@doj.ca.gov

October 5, 2005

FREEDOM OF INFORMATION ACT REQUEST
Certified Mail, Return Receipt Requested

National Highway Traffic Safety Administration
Executive Secretariat
Room 5221
400 Seventh Street, S.W.
Washington, DC 20590

Donald Hawkins, FOIA Officer
Office of Management and Budget
Room 9026
725 17th Street, NW
Washington, D.C. 20503

National Freedom of Information Officer
U.S. EPA, Records, FOIA and Privacy Branch
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

Kathy Ray
Office of the Secretary of Transportation
C-12/Room 5432
400 Seventh Street, SW
Washington, D.C. 20590

Dear FOIA Officer:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. section 552, as amended, and its implementing regulations, I hereby make this request for records on behalf of the Attorney General of the State of California. This request describes: (1) the records sought; and (2) our request for a fee waiver for production of these records.

Request for Materials

The Office of the Attorney General respectfully requests the disclosure of:

All records (including agendas, minutes of meetings, e-mails, correspondence, notes of phone conversations, proposals, drafts, comments, notes, memoranda, intra and inter-agency communications, and any other record) related to the discussion regarding state regulation of motor vehicle carbon dioxide emissions found under the heading "Executive Order 13132 Federalism" published in the Federal Register, volume 70, at page 51457.

NHTSA Executive Secretariat, et al.
October 5, 2005
Page 2

This request includes records at the headquarters or other offices of the National Highway Traffic Safety Administration, Office of Management and Budget, Department of Transportation, U.S. Environmental Protection Agency, the individual files of agency employees involved in the above-referenced matters, or any combination thereof. This request is made with the understanding that it will be forwarded to any other offices that may be in possession of the requested documents.

If you deny any part of this request please cite each specific reason that you believe justifies your refusal to release the information.

Should you elect to withhold any documents responsive to this request under Exemption 5 of FOIA, please explain:

- 1) Why is each document predecisional?
 - A. To what decision are each of the documents leading?
 - B. Has this decision been finalized?
- 2) Why is each document deliberative?
 - A. To what extent does each make a recommendation on a legal or policy matter?
- 3) What policy recommendation qualifies this document for exemption?

Request for a Fee Waiver

The California Attorney General is, of course, a noncommercial organization not subject to review fees. In addition, the Attorney General requests a waiver of search and copying fees associated with this request. Under FOIA, agencies must waive such fees where disclosure is likely to contribute significantly to public understanding of the operations and activities of the government and disclosure is not primarily in the commercial interest of the requesters. See 5 U.S.C. § 552(a)(4)(A)(iii). Under the criteria set forth at 7 CFR, Subtitle A, Part 1, Subpart A, Appendix A, Section 6 (a)(1) and Section 6(a)(3), such a waiver is appropriate here. The Attorney General's Office acts on behalf of the State and the public pursuant to the California Constitution, statutory authority, and common law. See Cal. Const. art. V, § 13; Cal. Gov. Code §§ 12511, 12600-12; *D'Amico v. Board of Medical Examiners*, 11 Cal.3d 1, 14-15 (1974).

The subject of this request concerns records related to statements made by the National Highway Traffic Safety Administration that appear to be directed specifically at greenhouse gas emission regulations developed by California's Air Resources Board. A key issue in state-federal relations and in the ability of the State of California to promulgate regulations protecting public health is the nature and extent of federal preemption of state law. Executive Order 13132 Federalism is directly related to that issue. As the Order states, "the national government should be deferential to the States when taking action that affects the policymaking discretion of the States and should act only with the greatest caution where State or local governments have

NHTSA Executive Secretariat, et al.
 October 5, 2005
 Page 3

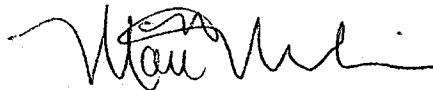
identified uncertainties regarding the constitutional or statutory authority of the national government." Exec. Order No. 13132, 64 Fed. Reg. 43256. The Order counsels the federal government to "where possible, defer to States to establish standards." Id. The Order states that "any regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated."

Information provided to the Attorney General will help the Attorney General in representing over 30 million People of the State of California and in helping Californians understand the decision-making process of the National Highway Traffic Safety Administration. The State of California, and the people represented by the Attorney General, would benefit significantly by access to the information requested.

The Attorney General, of course, seeks the materials without reference to any commercial interest.

Please send all materials to my attention at the address listed on the letterhead. Please call me at (510) 622-2133 if you have any questions about this request.

Sincerely,



MARC N. MELNICK
 Deputy Attorney General

For BILL LOCKYER
 Attorney General

U.S. Postal Service
CERTIFIED MAIL RECEIPT
 (Domestic Mail Only; No Insurance Coverage Provided)

Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$

Postmark
 Here

Recipient's Name (Please Print Clearly) (To be completed by mailer)
National Freedom of Information Officer
 Street, Apt. No.; or PO Box No.
1200 Pennsylvania Ave., NW (2822T)

EXHIBIT B



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

November 15, 2005

Mr. Marc N. Melnick
Deputy Attorney General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550

Dear Mr. Melnick:

This is in further response to your Freedom of Information Act (FOIA) request to the Office of Management and Budget (OMB) dated October 5, 2005, which was received in this office on October 18, 2005. In your request, you asked for "all records (including agendas, minutes of meetings, e-mails, correspondence, notes of phone conversations, proposals, drafts, comments, notes, memoranda, intra and inter-agency communications, and any other record) related to the discussion regarding state regulation of motor vehicle carbon dioxide emissions found under the heading "Executive Order 13132 Federalism" published in the Federal Register, volume 70, at page 51457."

Due to unusual circumstances, an extension of up to 10 working days will be necessary to process your request. This additional time is required because, in order to respond to your request, there has been a need for consultation with other components within OMB having a substantial interest in the determination of the request. The authority for this extension can be found in 5 U.S.C. 552(a)(6)(B).

We will respond to you, in subsequent correspondence, concerning the further processing of your request, including our response to your request for a fee waiver.

Sincerely,

A handwritten signature in black ink that reads "Donald K. Hawkins". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Donald K. Hawkins
FOIA Officer

EXHIBIT C



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

December 14, 2005

Mr. Marc N. Melnick
Deputy Attorney General
State of California, Department of Justice
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550

Dear Mr. Melnick:

This is in further response to your Freedom of Information Act (FOIA) request to the Office of Management and Budget (OMB) dated October 5, 2005, which was received in this office on October 18, 2005. In your request, you asked for "all records (including agendas, minutes of meetings, e-mails, correspondence, notes of phone conversations, proposals, drafts, comments, notes, memoranda, intra and inter-agency communications, and any other record) related to the discussion regarding state regulation of motor vehicle carbon dioxide emissions found under the heading "Executive Order 13132 Federalism" published in the Federal Register, volume 70, at page 51457." We have interpreted your request to concern documents regarding the August 30, 2005, Notice of Proposed Rulemaking (at 70 Federal Register, page 51457) discussion of state regulation of motor vehicle carbon dioxide emissions found under the heading "Executive Order 13132."

In response to your request, OMB has searched for all responsive information to your request. We identified 52 documents that are responsive to your request. However, 47 of these documents are being withheld in their entirety, pursuant to 5 U.S.C. §552 exemption (b)(5). We have also withheld portions of the released documents pursuant to 5 U.S.C. §552(b)(5), because they constitute interagency or intra-agency predecisional, deliberative communications, the disclosure of which would inhibit the frank and candid exchange of views that is necessary for effective government decision making, and therefore find that the public interest would not be served by its release. Accordingly, OMB has decided to withhold this information. Lastly, you will find that we have redacted

information that has been found to be non-responsive to, and outside of the scope, of your request.

This is my personal decision, which can be appealed in accordance with OMB's FOIA regulations, which are found at 5 C.F.R. Part 1303.

Sincerely,

A handwritten signature in cursive script, reading "Donald K. Hawkins".

Donald K. Hawkins
FOIA Officer

EXHIBIT D



BILL LOCKYER
Attorney General

State of California
DEPARTMENT OF JUSTICE

455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CA 94102-7004

Public: (415) 703-5500
Telephone: (415) 703-5605
Facsimile: (415) 703-5480
E-Mail: gavin.mccabe@doj.ca.gov

January 18, 2006

VIA FACSIMILE AND U.S. MAIL

Donald K. Hawkins
FOIA Officer
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

RE: OMB December 14, 2005 Response to FOIA Request

Dear Mr. Hawkins:

I am writing to follow up on your December 14, 2005 letter to my colleague, Marc Melnick, in response to Mr. Melnick's request to OMB under the Freedom of Information Act (FOIA). A copy of your letter, which was received in this office on January 4, 2006, is attached for your reference. In particular, I am following up on the portion of your letter which states that you have identified 52 documents responsive to Mr. Melnick's request but that you are withholding 47 of those 52 documents pursuant to 5 U.S.C. § 552(b)(5).

In order for us to determine whether we wish to appeal the withholding of those 47 documents, we request that you provide us with the following information for each individual document: 1) author; 2) recipient(s); 3) date; and 4) subject. Please direct any and all further communications regarding this matter to the undersigned at the mailing address provided on the letterhead above. Also, please feel free to call me at (415) 703-5605 if you have any questions or wish to discuss this matter.

Sincerely,

A handwritten signature in dark ink, appearing to read "Gavin G. McCabe".

GAVIN G. MCCABE
Deputy Attorney General

For **BILL LOCKYER**
Attorney General

Encl.

cc: DAG Marc Melnick



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

December 14, 2005

Mr. Marc N. Melnick
Deputy Attorney General
State of California, Department of Justice
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550

Dear Mr. Melnick:

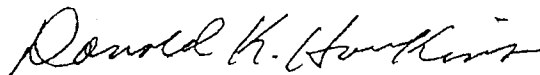
This is in further response to your Freedom of Information Act (FOIA) request to the Office of Management and Budget (OMB) dated October 5, 2005, which was received in this office on October 18, 2005. In your request, you asked for "all records (including agendas, minutes of meetings, e-mails, correspondence, notes of phone conversations, proposals, drafts, comments, notes, memoranda, intra and inter-agency communications, and any other record) related to the discussion regarding state regulation of motor vehicle carbon dioxide emissions found under the heading "Executive Order 13132 Federalism" published in the Federal Register, volume 70, at page 51457." We have interpreted your request to concern documents regarding the August 30, 2005, Notice of Proposed Rulemaking (at 70 Federal Register, page 51457) discussion of state regulation of motor vehicle carbon dioxide emissions found under the heading "Executive Order 13132."

In response to your request, OMB has searched for all responsive information to your request. We identified 52 documents that are responsive to your request. However, 47 of these documents are being withheld in their entirety, pursuant to 5 U.S.C. §552 exemption (b)(5). We have also withheld portions of the released documents pursuant to 5 U.S.C. §552(b)(5), because they constitute interagency or intra-agency predecisional, deliberative communications, the disclosure of which would inhibit the frank and candid exchange of views that is necessary for effective government decision making, and therefore find that the public interest would not be served by its release. Accordingly, OMB has decided to withhold this information. Lastly, you will find that we have redacted

information that has been found to be non-responsive to, and outside of the scope, of your request.

This is my personal decision, which can be appealed in accordance with OMB's FOIA regulations, which are found at 5 C.F.R. Part 1303.

Sincerely,

A handwritten signature in cursive script, reading "Donald K. Hawkins".

Donald K. Hawkins
FOIA Officer

EXHIBIT E

BILL LOCKYER
Attorney General

State of California
DEPARTMENT OF JUSTICE



455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CA 94102-7004

Public: (415) 703-5500
Telephone: (415) 703-5605
Facsimile: (415) 703-5480
E-Mail: gavin.mccabe@doj.ca.gov

February 1, 2006

VIA FACSIMILE AND U.S. MAIL

Donald K. Hawkins
FOIA Officer
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

RE: Appeal of OMB December 14, 2005 Response to FOIA Request

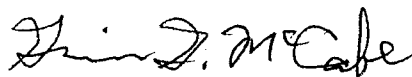
Dear Mr. Hawkins:

Pursuant to 5 C.F.R. § 1303.10(e), this letter is to appeal the Office of Management and Budget's ("OMB") December 14, 2005 response to a Freedom of Information Act ("FOIA") request filed by my colleague, Marc Melnick, on October 5, 2005. Because OMB's response was not received in this office until January 4, 2006, this appeal is made "within 30 days of receipt of a denial" as required under 5 C.F.R. § 1303.10(e). OMB's response provided some documents responsive to Mr. Melnick's request but also stated that OMB was withholding 47 responsive documents pursuant to 5 U.S.C. § 552(b)(5). OMB also explained that for the documents that were provided, OMB had redacted portions of the documents in part based on 5 U.S.C. § 552(b)(5) and in part because some portions of documents were "non-responsive to, and outside the scope of" Mr. Melnick's request.

This appeal addresses OMB's denial of the FOIA request both as to the 47 withheld documents and as to the redacted portions of the documents that were provided. The basis for this appeal is that we believe OMB has failed to demonstrate that the 47 documents withheld meet the standards for withholding under 5 U.S.C. § 552(b)(5). In a letter to OMB dated January 18, 2006, we asked for additional information about the withheld documents, including date, author, subject, and recipient. To date we have received no response. We also believe that OMB has failed to demonstrate that the redacted portions of documents provided are outside the scope of Mr. Melnick's request and or that the standards for withholding under 5 U.S.C. § 552(b)(5) have been met.

Thank you for your attention to this matter. Please feel free to call me at (415) 703-5605 if you have any questions or wish to discuss this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Gavin G. McCabe". The signature is fluid and cursive, with the first name "Gavin" and last name "McCabe" clearly distinguishable.

GAVIN G. McCABE
Deputy Attorney General

For BILL LOCKYER
Attorney General

cc: DAG Marc Melnick

EXHIBIT F



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

March 10, 2006

[SENT VIA FACSIMILE (510) 622-2270 AND FIRST CLASS U.S. MAIL]

Mr. Marc N. Melnick
Deputy Attorney General
State of California, Department of Justice
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550

Dear Mr. Melnick:

This responds to your correspondence dated January 18, 2006, as well as your appeal letter dated February 1, 2006, concerning the Office of Management and Budget's (OMB's) response of December 14, 2005, to your Freedom of Information Act (FOIA) request dated October 5, 2005.

In your FOIA request you asked for "all records (including agendas, minutes of meetings, e-mails, correspondence, notes of phone conversations, proposals, drafts, comments, notes, memoranda, intra and inter-agency communications and any other record) related to the discussion regarding state regulation of motor vehicle carbon dioxide emissions found under the heading 'Executive Order 13132 Federalism' published in the Federal Register, volume 70, at page 51457."

In our December 14, 2005 response letter, OMB stated that it had conducted a search for documents responsive to your request and had identified 52 responsive documents. At that time OMB released 5 of those documents to you, some with redactions. The redactions were made either because portions of those documents were outside the scope of your FOIA request (and therefore non-responsive) or were withheld pursuant to FOIA Exemption 5. 5 U.S.C. § 552(b)(5). In addition, OMB determined that the remaining 47 documents were exempt from mandatory disclosure and withheld those documents pursuant to FOIA Exemption 5.

In your appeal letter replying to OMB's response, you asked OMB to reconsider its decision to withhold the 47 documents and the redacted portions of the other 5 documents.

In response to your appeal, OMB has again reviewed the 52 documents. Based on our review, we have determined that -

1. in addition to being properly withheld under FOIA Exemption 5, two of the 47 documents were not responsive to the FOIA request because they relate to other aspects

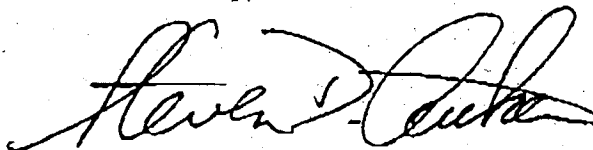
- of the proposed rule that are not within the scope of the FOIA request (and thus we are continuing to withhold those two documents);
2. we are releasing portions of 11 other documents that we had previously withheld in their entirety (and are continuing to withhold the remaining portions of those documents under FOIA Exemption 5);
 3. we are continuing to withhold the remaining 34 documents in their entirety under FOIA Exemption 5; and
 4. with respect to the five documents that we had previously released in part (and redacted the other portions), we are continuing to withhold the redacted portions under FOIA Exemption 5.

The documents -- and portions of documents -- that we are continuing to withhold under FOIA Exemption 5 U.S.C. § 552(b)(5), constitute intra-agency or inter-agency, pre-decisional, and deliberative communications, the disclosure of which would inhibit the frank and candid exchange of views necessary for effective government decision making. The withheld materials consist of pre-decisional opinions, discussions and/or draft versions of documents which were being considered, commented upon and revised by Executive Branch staff during the deliberations that occurred in the preparation of the proposed rule. We believe that the release of those materials would chill the deliberative process, which would be contrary to the public interest.

As noted above, we have also determined, upon closer review in response to your appeal, that two of the 47 withheld documents were not responsive to your FOIA request (in addition to their being predecisional, deliberative documents that may be withheld under FOIA Exemption 5). These two documents relate to deliberative and pre-decisional communications regarding other aspects of the proposed rule that do not fall within the scope of the FOIA request. In addition, portions of the other materials that we are withholding under FOIA Exemption 5 may also be non-responsive.

Judicial review of my action on your appeal is available to you in accordance with the provisions of 5 U.S.C. § 552(a)(4).

Sincerely,



Steven D. Aitken
Deputy General Counsel

Enclosures